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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 201

JOHN DALMER BENTON,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE MARYLAND COURT OF APPEALS

SUPPLEMENTARY BRIEF FOR THE PETITIONER

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INDEX

SUBJECT INDEX

SUPPLEMENTARY BRIEF FOR THE PETITIONER

	Page
Background and Question Presented	1
Argument:	
I. (A) The Doctrine of *Res Judicata*, as Well as Double Jeopardy, Is Applicable to Criminal Cases and Operates to Conclude Those Matters in Issue Which Have Been Determined by a Previous Verdict	2
(B) Injecting the Larceny Charge Into the Trial Proceedings Was Fundamentally Unfair and a Denial of Due Process of Law	5
II. The Concurrent Sentence Doctrine Enunciated in *Hirabayashi* v. *United States* Is Invalid Today	7
Conclusion	10

CITATIONS

CASES:

Bruton v. *United States*, decided May 20, 1968, —— U.S. ——, 88 S.Ct. 1620	4
Carafas v. *Lavallee*, 391 U.S. 234	2
Estes v. *State of Texas*, 381 U.S. 544	5
Fiswick v. *United States*, 329 U.S. 211	8
Fletcher v. *State*, 231 Md. 190, 189 A2d. 641 (1963)	3
Gideon v. *Wainwright*, 372 U.S. 335	6
Ginsberg v. *New York*, 390 U.S. 629	2
Hirabayashi v. *United States*, 320 U.S. 81	2, 7, 10

	Page
Peyton v. *Rowe*, 391 U.S. 54	2
Pollard v. *United States*, 352 U.S. 354	7, 8
Rideau v. *State of Louisiana*, 373 U.S. 723	6
St. Pierre v. *United States*, 319 U.S. 41	7
Sealfon v. *United States*, 332 U.S. 575	3, 4
Sheppard v. *Maxwell*, 384 U.S. 333	5
Sibron v. *New York*, 392 U.S. 40	2, 8, 9
Tait v. *Western Maryland Ry.*, 289 U.S. 620	3
Turner v. *State of Louisiana*, 379 U.S. 466	6
United States v. *Kahner*, 317 F2d 459 (2nd Cir. 1963)	4
United States v. *Morgan*, 346 U.S. 502	8
United States v. *Oppenheimer*, 242 U.S. 85	4
Washington v. *United States*, 126 U.S.App.D.C. 389, 379 F2d 166	4
White v. *State of Maryland*, 373 U.S. 59	6
UNITED STATES CONSTITUTIONAL PROVISIONS:	
Fifth Amendment	1, 5
Fourteenth Amendment	4, 5
STATUTES:	
Annotated Code of Maryland, Article 27, § 30	3
Annotated Code of Maryland, Article 41, § 127	8

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Background and Question Presented

This case was argued before the Court on December 12, 1968, on the issue of whether "[T]he double jeopardy clause of the Fifth Amendment is applicable to State criminal proceedings through the Fourteenth Amendment." On December 16, 1968, the Court entered the following Order:

> "This case is restored to the docket for reargument on March 24, 1969, limited to the following question, not specified in original Writ:

> Does the 'concurrent sentence doctrine' enunciated in *Hirabayashi* v. *United States,* 320 U.S. 81, 105, and subsequent cases, have continuing validity in light of such decisions as *Ginsberg* v. *New York,* 390 U.S. 629, 633, no. 2, *Peyton* v. *Rowe,* 391 U.S. 54, *Carafas* v. *Lavallee,* 391 U.S. 234, 237-238, and *Sibron* v. *New York,* 392 U.S. 40, 50-58?"

In this Supplementary Brief, counsel will undertake to answer the Court's question. However, it is respectfully submitted that in the instant case, the Court need not reach the certified question for the following reasons. The "Hirabayashi—concurrent sentence doctrine" pre-supposes a situation where more than one conviction is obtained in a single trial, and at least one of the convictions is valid. However, in this case, both convictions are invalid and both should therefore be vacated. Thus, in this Supplementary Brief, counsel will first seek to outline the reason why both convictions should be reversed.

ARGUMENT

I.

(A) The Doctrine of Res Judicata, as Well as Double Jeopardy, Is Applicable to Criminal Cases and Operates to Conclude Those Matters in Issue Which Have Been Determined by a Previous Verdict.

In the first trial petitioner was prosecuted for burglary and larceny (A. 1). He was found guilty of burglary and not guilty of larceny (A. 1). Both verdicts were rendered by the jury after deliberation on the evidence. The first jury actually and necessarily adjudicated the question of

whether the petitioner, defendant, took and carried away the complaining witness' personal property. This is an essential element of larceny.[1] Although a transcript of the testimony of the first trial is not available, this assertion is supported by the evidence adduced at the second trial, the general remarks made at that second trial, and the record entries made by the trial court in both trials.

Notwithstanding the jury's adjudication that the petitioner did not take and carry away the complaining witness' personal property, the court allowed the petitioner to be tried again for larceny and permitted the prosecution to put on the same evidence which was used in the larceny charge in the first trial. The evidence consisted of testimony from the complaining witness that after petitioner left his premises, he discovered certain items of personal property missing (Record, pp. 124, 125, and 126). It is submitted that the wrongful admission of evidence of larceny in the second trial, vitiated petitioner's conviction of burglary.

A previous judgment, between the same parties, is conclusive as to those matters actually and necessarily adjudicated therein. *Tait* v. *Western Maryland Ry.*, 289 U.S. 620. This Court has ruled that evidence, tending to prove the commission of a crime of which a defendant was previously found not guilty is inadmissible in a new trial. In *Sealfon* v. *United States*, 332 U.S. 575, the Court said:

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[1] "Larceny" under the common law of Maryland, is a felonious taking and carrying away of the personal property of another with intent to deprive the owner of the property permanently. *Fletcher* v. *State*, 231 Md. 190, 189 A2d 641 (1963).

Burglary is defined in Article 27, Sec. 30, of the Maryland Code. "(a) Every person, . . . who shall break and enter any dwelling house in the nighttime with the intent to steal . . . shall be guilty of burglary."

> "But res judicata may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings . . . and operates to conclude those matters in issue which the verdict determined though the offenses be different." 332 U.S. 578.

This principle of *res judicata* is a "fundamental principle of justice" and therefore applies to State criminal proceedings through the Fourteenth Amendment due process of law clause. *United States* v. *Oppenheimer*, 242 U.S. 85, 88.

Clearly, the jury in the second trial was erroneously allowed to consider irrelevant and incompetent evidence presented by the prosecution. The petitioner was thereby denied a basically fair trial. As recently said by this Court, "An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." *Bruton* v. *United States*, decided May 20, 1968, —— U.S. ——, 88 S.Ct. 1620. In a case involving admission of evidence, it was said, "The trial judge should, in an exercise of sound discretion, exclude evidence tending to show commission of other crimes where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." *United States* v. *Kahner*, 317 F2d 459, 472 (2nd Cir. 1963).

It is submitted that in this case, it is impossible to accurately determine whether the burglary conviction was or was not brought about, or influenced, by the jury's consideration of the irrelevant and incompetent testimony of larceny. Therefore, the burglary conviction should be reversed. *Washington* v. *United States*, 126 U.S.App.D.C. 389, 379 F2d 166. Of course, the larceny conviction should be reversed because it was obtained in violation of petitioner's right not to be twice put in jeopardy.

(B) Injecting the Larceny Charge Into the Trial Proceedings Was Fundamentally Unfair and a Denial of Due Process of Law.

Petitioner contends that even if he had not been able to point out exact reasons, as he did above, why trying the invalid larceny charge with the valid burglary charge prejudiced the entire trial and requires reversal of both convictions, that he would still be entitled to the requested relief because on its face such a trial is unfair and a denial of due process required by the Fourteenth Amendment. He argues that the mere injecting of the improper larceny charge, which was gained by violating petitioner's Fifth Amendment double jeopardy rights into the trial proceedings, tainted everything that occurred therein with fundamental unfairness. In *Estes* v. *State of Texas,* 381 U.S. 544, and *Sheppard* v. *Maxwell,* 384 U.S. 333, where there was television coverage of the trial within the courtroom and uncontrolled pre-trial publicity, respectively, this Court struck down the conviction because of the *probability* of unfairness. In both cases, even though the Court enumerated possible reasons why the publicity made the trials improper, the Court concluded that if the act complained of involved a probability of prejudice or unfairness then the conviction must be reversed. The Court stated it as follows in *Estes*:

> "The State, however, says that the use of television in the instant case was 'without injustice to the person immediately concerned,' basing its position on the fact that the petitioner has established no isolatable prejudice and that this must be shown in order to invalidate a conviction in these circumstances. The State paints too broadly in this contention, for this Court

itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal. This is such a case."

See also, *Rideau* v. *State of Louisiana,* 373 U.S. 723, and *Turner* v. *State of Louisiana,* 379 U.S. 466, where this Court went beyond consideration of the actual effect of the excessive pre-trial publicity, and struck down the conviction on the ground that unfairness was inherent in it. And, again in *Gideon* v. *Wainwright,* 372 U.S. 335, and *White* v. *State of Maryland,* 373 U.S. 59, where the Court reversed convictions because of the basic unfairness involved in denying counsel to the defendants in the pre-trial and trial proceedings. In neither of these cases did the Court concern itself with the precise effect which denial of counsel had upon the petitioners, but only with the fact that it was unfair. From the foregoing cases one reaches the conclusion that if prejudice is injected into the trial or if prejudice arises during trial that probably affects the fairness of the trial, then due process of law requires a reversal of any conviction that may result. It would not seem to make any difference what the unfairness consisted of, uncontrolled pre-trial publicity, live television during trial, lack of counsel or injecting an improper charge into the proceedings. The law provides that if there is a probability of unfairness, there is a lack of due process and the trial is vitiated. Petitioner contends that the facts of his case sustain the burden of probability of unfairness and that his conviction for burglary should be reversed as well as the one for larceny.

II.

The Concurrent Sentence Doctrine Enunciated in Hirabayashi v. United States Is Invalid Today.

In *Hirabayashi* v. *United States,* 320 U.S. 81, 105, the Court held that if at least one of two convictions obtained in a single trial was valid, it would not consider the validity of the remaining conviction where the sentences were to be served concurrently. The second conviction was thus considered to be a mooted legal issue not requiring judicial review. The rationale supporting the concurrent sentence mootness doctrine is equally applicable to the situation presented where the defendant has completed service of his imprisonment. In this latter situation the Court has made an exception to the mootness doctrine where " . . . under either State or Federal law further penalties or disabilities can be imposed . . . as a result of the judgment which . . . has been satisfied." *St. Pierre* v. *United States,* 319 U.S. 41.

The *St. Pierre* decision implied that the defendant had the burden of establishing the existence of "collateral legal consequences" resulting from conviction. This burden was shifted in *Pollard* v. *United States,* 352 U.S. 354, where the Court presumed that collateral legal consequences existed as a result of a conviction that for one reason or another had become apparently moot when presented for review. The Court, at page 358, said:

> "The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits."

Recently, this Court reviewed the "mootness" issue in *Sibron* v. *State of New York, supra.* Referring to its decision on mootness in *Pollard* v. *United States, supra, Fiswick* v. *United States,* 329 U.S. 211, and *United States* v. *Morgan,* 346 U.S. 502, the Court said:

> "The Court thus acknowledged the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences. The mere 'possibility' that this will be the case is enough to preserve a criminal case from ending 'ignominiously in the limbo of mootness'." 88 S.Ct. 1899.

There is no cogent reason why the Court's philosophy on mootness should be less applicable to concurrent sentences than it is to sentences of imprisonment already served at the time of review. Myriad collateral legal consequences, many of them unpredictable, will affect the defendant in either case.

In the instant case there are probable collateral legal consequences that stem from the invalid larceny conviction. The most obvious and immediate consequence is the period of time petitioner will have to serve under his conviction. Article 41, § 127, of the Annotated Code of Maryland, in pertinent part, provides:

> "The State's attorney . . . is hereby required to make and transmit to the Board of Parole and Probation . . . a resume of the facts and evidence adduced *in each case* tried . . . so that the Board . . . may have an abstract of each case in which application for parole may be made under the provisions of this article." [Emphasis supplied.]

The Board of Parole and Probation considers the number of convictions rendered against an applicant as a factor in determining his eligibility for parole or probation. It is a fair assumption that if petitioner is serving a sentence for one, rather than two convictions, he is likely to be released earlier.

Another legal consequence may consist of the use which a future judge may make of the larceny conviction. In *Sibron* v. *State of New York, supra,* this Court said:

> "A judge or a jury faced with a question of character, like a sentencing judge, may be inclined to forgive or at least discount a limited number of minor transgressions, particularly if they occurred sometime in the relatively distant past.[2] It is impossible for this Court to say at what point the number of convictions on a man's record renders his reputation irredeemable."

Use of a felony conviction to impeach a defendant's character, commonly allowed in most jurisdictions, and ineligibility under municipal licensing laws, are just a few other collateral legal consequences of the unlawful conviction. It is further submitted that the conviction should be reversed under this Court's inherent power to simply correct a wrong.

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[2] Counsel is advised that the petitioner has one previous felony conviction which occurred in 1939.

Conclusion

Based upon the foregoing it is respectfully submitted that since irrelevant and incompetent evidence was used against the petitioner he did not have a fair trial and both convictions are invalid and should be reversed. It is further submitted that the concurrent sentence doctrine enunciated in *Hirabayashi* v. *United States* is invalid.

Respectfully submitted,

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